Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1581

PAUL LEEMON, SR.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT

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JURISDICTIONAL STATEMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

PAUL LEEMON, SR.,
Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,
Appellee.

JURISDICTIONAL STATEMENT OF APPELLANT

APPEAL FROM THE SUPREME COURT OF ILLINOIS

A.

This appeal arises from two decisions rendered in the Appellate Courts of the State of Illinois, being entitled "People of the State of Illinois v. Paul Leemon, Sr.," first heard and decided in the Illinois Appellate Court, Fourth Judicial District, Springfield, Illinois, and appearing in 28 Ill. App. 3d 541, 328 N.E. 2d 645 (Ill. App. 4th D. 1975), and the second opinion being People v. Leemon, No. 47719, Petition For Leave To Appeal, decided per curiam on September 25, 1975, denying said Petition For Leave To Appeal. Thereafter, the mandate in said cause was stayed pending perfection of this appeal, and so has not been officially published. A copy of both opinions is appended hereto in conformance with subparagraph (H).

B.

The jurisdiction of this cause is properly lodged in the United States Supreme Court pursuant to Title 28, Section 1257 (2), as Appellant, Paul Leemon, Sr., seeks direct review of a criminal conviction in the Illinois Courts for the crime of conspiracy to commit burglary, which conviction was affirmed by the Illinois Appellate Court, Fourth Judicial District, Springfield, Illinois, on May 22, 1975, and affirmed without opinion on September 25, 1975, by the Illinois Supreme Court, and thereafter Notice of Appeal filed on January 13, 1976.

No application for rehearing was filed with the Illinois Supreme Court, and the Notice of Appeal to the United States Supreme Court was filed with the Clerk of the Illinois Supreme Court on January 13, 1976, and Notice of Filing given to the States Attorney on the same date.

The statute conferring jurisdiction of the United States Supreme Court over this cause is found in Title 28, Section 1257 (2) which reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

The judicial support for a direct appeal of this cause is found in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921); Johnson v. Florida, 391 U.S. 596, 88 S.Ct. 1713, 20 L. Ed.2d 838 (1968); Williams v. Florida, 399 U.S. 78 (1970); Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct.

1444, 20 L.Ed2d 491 (1968) and George v. Illinois, 167 Ill. 447, 47 N.E. 741 (1897).

The State Constitution, Article I, Sections 2, 10 and 13 of 1970, and the Illinois Revised Statutes, Chapter 38, Sections 8-2(a) and 19-1(A) which are appended hereto under the provisions of subparagraph (h) or appendix hereto, were called into question based upon Appellant's contentions that the submission of the two counts of the indictment, one for conspiracy to commit burglary and burglary, and the subsequent conviction of conspiracy and acquittal of burglary constituted a legal and logical inconsistency which denied the Appellant his right to trial by jury, due process and equal protection under the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution.

A short record setting forth the proceedings in the Illinois Supreme Court is likewise appended hereto and made a part of the appendix filed herewith.

C.

QUESTIONS PRESENTED BY THE APPEAL

1. Is there a direct or implicit guarantee of continuity and content to a state constitutional guarantee of trial by jury promulgated in the language of the 5th, 6th, 9th and 14th amendments of the United States Constitution so as to extend and preserve a state criminal defendant's right to trial by jury, burden of proof, presumption of innocence, freedom from double jeopardy and a legally and logically inconsistent criminal verdict?

2. Does the Illinois Statute on conspiracy require proof of an overt act upon the part of the defendant so that acquittal of the substantive offense of burglary also made implicit a finding on the part of the jury that Appellant

did not commit an overt act connected with said offense, and hence is being punished for status rather than proof of criminality?

3. Does the Illinois Constitution, Article I, Sections 2, 10 and 13, guarantee to a criminal defendant the right to a trial by jury which historically embodies a right to a finding of guilty or not guilty which is neither logically or legally inconsistent so as to protect the rights of Appellant to proof beyond a reasonable doubt, and a continuing presumption of innocence which cannot be suspended by the judiciary or the legislature in view of the Illinois Constitution?

4. Does the language of the Fifth, Sixth, Ninth and Fourteenth Amendments to the United States Constitution require the states to apply the provisions of their respective state constitutions equally to all citizens in the trial of criminal cases by jury so that fundamental rights cannot be infringed upon by a judicial device of construction that the prohibition against double jeopardy is satisfied by non-imposition of sentence after submission of inconsistent counts and the return of inconsistent verdicts by the jury in trials involving inchoate and choate offenses arising out of the same fact situation?

5. Did the Illinois revision of its criminal code defining the crime of conspiracy operate to establish a separate, substantive offense of conspiracy, or did the failure of said revision to delineate the doctrine of merger cause the crime of conspiracy to operate under the doctrine of common law merger and thereby deny Appellant his historical right to trial by jury under Illinois law?

D.

STATEMENT OF THE CASE

Sometime on the morning of July 1, 1973, the premises

of Mabel Kramer, located near Mason City, Illinois, were burglarized. The evidence is not consistent, but tends to indicate the burglary occurred about 10:00 or 10:15 a.m. (R 8, A 24).

Two of the three alleged parties responsible for this offense were apprehended before 12:00 noon, within a short distance from the scene of the crime, having fled from the house on discovery by the owner, Mabel Kramer, and her husband, Theodore Kramer (R 11, A 25).

Mr. and Mrs. Kramer had returned home from Church, to find the door and lock tampered with, and Mr. Kramer had entered the house (R 8, A 24). On being surprised during their search and burglary, Donald and Richard McCloud, ran from the house into nearby fields (R 9, A 25). The local police, aided by outside law enforcement personnel, airplane and tracking dogs, discovered the defendants, arrested and took them to the Mason County jail (R 12-13, 23, A 26, 31).

A search for the third person and the vehicle by which Donald McCloud and Richard McCloud had arrived at the farm residence was undertaken, for approximately a one mile radius of the Kramer residence (R 20, A 30). No tracks or evidence of a vehicle were found and no third person apprehended on July 1, 1973.

On Monday, the two accused persons, Donald McCloud and Richard McCloud were released on bail (R 40, A 39). Sometime thereafter, apparently around July 25, 1973, Donald McCloud confessed to the burglary and implicated Richard McCloud and his uncle, the Defendant, Paul Leemon, Sr. (C 22, 23, A 8). The testimony, which closely tracked the statement of Donald McCloud, tended to establish a sequence of events linking the Defendant with planning the crime; planning the commission; physically driv-

ing the two accused men to the scene and his presence at the premises, and leaving the two accused with instructions for a rendezvous in 15 to 20 minutes up the road from the Kramer residence (R 35-42; A 36-40).

Pretrial motions were filed by defense counsel attacking the sufficiency of Count Two of the Indictment, on the grounds that no crime had been alleged (C 13, A 7, 8); and that under the provisions of Chapter 38, Section 8-2 (a) on conspiracy and Chapter 38, Section 19-1 (a) on burglary, the inchoate offense of conspiracy merged into the completed crime and therefore Defendant, Paul Leemon, Sr., could not be charged with both offenses (C 10, 11, R 5-7). At this point, defense counsel urged the possible violations of the Fifth, Sixth and Fourteenth Amendments of the United States Constitution as prohibitions to trial of the two counts, and that it affected the defendant's rights to protection from double jeopardy, from harassment by multiple prosecutions for one alleged crime arising out of a single fact situation and that a trial without requirement of an election by the State on which charge it chose to proceed upon would violate the Illinois Constitution of 1970, Article I, Section 2 and 10.

These defense motions were duly heard and considered by the Trial Judge and denied (C 27, A 9).

Trial commenced on November 13, 1973, before a jury of twelve persons, and upon both counts of the Indictment (C 179, A 23).

The State's evidence was consistent with the earlier statement of Donald McCloud, that a conspiracy to commit burglary was framed by Defendant and Donald McCloud, prior to July 1, 1973 (C 22, 23, A 8). The parties met at the DeLuxe Cafe, in Peoria, Illinois, early on July 1, 1973, (R 36, A 37), made the decision to execute their plans and

departed for Mason City, Illinois, in Donald McCloud's 1973 Ford LTD (R 38, A 37, 38).

Donald McCloud testified that the three persons originally went to Mason City, to see if Church was out, and then proceeded to the Kramer residence (R 38, 39, A 38). He also stated that Leemon tried to open the front door of the Kramer residence and finding no one home, left in the auto to be met within 15 to 20 minutes north of the house (R 38, 39, A 38). Richard McCloud testified that he (Richard) knocked on the door of the Kramer residence, and not his uncle, Paul Leemon. (R 31, A 33).

Richard McCloud also testified the car was driven straight to the Kramer residence; that he tried the door and forced it open, and informed the jury he had pleaded guilty to burglary, had been sentenced prior to the instant trial (R 30-32, A 33-34).

However, Richard McCloud denied the participation of his uncle, the Defendant, Paul Leemon, Sr., in the planning or commission of the crime. He denied knowledge of the name of the third party (R 33-35, A 34-36).

The Defendant testified to his meeting with Donald McCloud and Richard McCloud early on July 1, 1973, at the Deluxe Cafe, by reason of taking Richard to meet Donald (R 53, A 43).

Defendant testified he worked in Peoria on the morning of July 1, 1973, (R 54, A 43), and that he was without knowledge as to the location of the Kramer residence and had not counselled or discussed the commission of the crime with either Donald or Richard McCloud (R 69, A 48).

The evidence also disclosed that Richard McCloud lived at the residence of Defendant; that Donald McCloud had been reared by Defendant (R 45, 58, 78, A 41, 51).

Defendant's alibi was the assertion of his presence in Peoria at or near 10:00 a.m., which was substantiated by his other witnesses, but largely by one Charles Waller, who remembered seeing the Defendant using the public telephone at Western and Howlett (R 100-106, A 58-60). This was close to the time of the burglary, near to 10:15 or 10:30 a.m.

Defendant's story was further buttressed by the testimony of Paul Leemon, Jr., (R 91, A 55) and Mrs. Gertrude Leemon, (R 84, A 53), Defendant's wife, with regard to the work done on July 1, 1973, by Paul Leemon, Sr., and the attempts of Paul Leemon, Sr., to awaken his son, Paul Leemon, Jr., to assist him with his carpentry work (R 89, A 54).

It should be noted that no impeachment was made by the State of Richard McCloud during his testimony or claim of surprise by the State; no impeachment or contradiction by way of rebuttal offered after the testimony of Charles Waller, the last witness for the defense.

At the close of all the evidence, defense counsel moved for a directed verdict of acquittal on both counts, and this motion was denied by the Court (R 123, A 66).

The case was submitted to the jury by the Court on both Counts of the Indictment, with alternate verdicts. A verdict of guilty of conspiracy but not guilty of burglary was found, returned, and verdict and judgment entered into the record. (R 148-159, A 67).

After several continuances, the Court heard the Motion of defendant to set aside the verdict, for acquittal and in the alternative for a new trial and the Court overruled the motion. (R 145-150, A 17-20). Defense counsel again urged the grounds of merger, double jeopardy and the in-

consistency of the verdicts when the substantive crime of burglary upon which the conspiracy was grounded had been returned as "not guilty." Defendant was thereafter given a presentence hearing in mitigation and aggravation, and sentenced to three to ten years in the State Penitentiary at Joliet, Illinois (C 137, A 15; R 151-166, A 21).

Defendant filed his Notice of Appeal on January 14, 1974, (C 138, A 15-16), and said cause is now before this Honorable Court based upon that Notice of Appeal and the alleged errors committed by the Court during trial.

However, two irregularities occurred during trial. One Lindsay was excused or did absent himself from the balance of the jury and without being accompanied by the bailiff and without consent on the part of either party. (C 147, A 18).

The second irregularity occurred during cross-examination of Charles Waller. When the States Attorney asked for a short recess, and apparently took the witness to the Circuit Clerk's office, and talked to Waller and caused the witness to use the telephone and talk to some third person. Waller was thereafter recalled to the stand and finished his testimony (C 149, A 19).

The Defendant-Appellant, Paul Leemon, Sr., thereafter raised the same federal constitutional issues as Point "D" of his appellate brief submitted and argued to the Illinois Appellate Court, Fourth Judicial District, Springfield, Illinois, specifically referring to the legal inconsistency of such findings by the jury in view of the facts as developed in the trial of the cause. (Appl. Brief p. 8, 15-27). These contentions were disposed of adversely to defendant-appellant in the court's subsequent opinion, *People v. Leemon,* 28 Ill. App. 3d 541, 328 N.E. 2nd 645.

The defendant-appellant, Paul Leemon, Sr., again urged

the same grounds as Point II of his Petition for Leave to Appeal before the Illinois Supreme Court, (See App. Brief p. 14-18), and again these contentions about a subsisting federal right which abrogated or negated the application given the Illinois Constitution and Illinois Revised Statutes was rejected *sub silento* by the Court's refusal to grant further proceedings or hearing to defendant-appellant (See Order of Ill. S.Ct. dated 9/25/75).

Defendant-appellant is now free on $20,000 bond pending the outcome of his appeal to the United States Supreme Court.

E.

SUBSTANTIAL NATURE OF FEDERAL QUESTIONS

The issues presented by this appeal are substantial and justify the exercise of plenary jurisdiction by the United States Supreme Court based upon the Illinois Supreme Court's determination that inconsistent counts in a single Indictment did not violate the appellant's right to freedom from double jeopardy, that the subjection of the defendant to trial was not the test of double jeopardy, but the submission to punishment; that the merger of the inchoate and substantive offense which arose by reason of the proof at trial was not legally inconsistent necessitating reversal and/or a new trial; that affirmance of the trial court verdict of guilty of conspiracy but not guilty of burglary was not a denial of defendant's Constitutional and statutory rights to a jury trial and to fundamental concepts of due process and equal protection.

1. Inconsistent Verdicts

It hardly needs to be stated that the problem of inconsistent verdicts is and remains an unsolved problem in both state and federal law. See *People v. Murray,* 340 N.E. 2d 186 (1st D. Ill. App. 1975) in which the intermediate

appellate court in Illinois finally made the Kierkegaardian leap of faith to hold both logical and legal inconsistency as not violative of a defendant's rights. This opinion presents the issues very sharply in respect to multiple crimes arising from the same fact situation, but, of course, does not reach the thorny issue of choate and inchoate offenses, the nature of which create a factor of similitude in the estoppel worked by the implicit findings of the jury by its verdict of [Yes, you did have the intent and commit an overt act in furtherance of the crime, and No, you are not guilty of the substantive offense.] The United States Supreme Court faced this issue in Duncan v. Louisiana, 391 U.S. 145, by its discussion of selective incorporation, and this was an inapposite resolution of the issue. See Harlan, J., dissenting on the same grounds as Harlan, J., his grandfather, had done in Twining v. New Jersey, 211 U.S. 78, 29 S.Ct. 14, 53 L.Ed 97 (1908), that the Court simply did not reach fundamentals, and that is, what is the characterization or guarantee under discussion, not simply by a broad verbalization, but in fact or in its operational nature as both a logical predicate and a consistent criminal regulation of immoral, objective, punishable conduct.

If the court is going to use selective incorporation and the ad hoc approach of Mr. Justice Harlan, then the issue of Singer v. United States, 380 U.S. 24, is simply not reached, for the historical content of a right to trial by jury, or any other federally guaranteed right which bleeds through the Fourteenth Amendment Due Process and Equal Protection Clauses into state law is not the same, and the measurement of any minimum standard would have to envision the adoption of the state standard, if this were different from the federal standard historically. See United States v. Vastine, 363 F.2d 853, 855 (3d Cir. 1966); Comment, 60 Colum. L. Rev. 999, 1002-04 n. 18 (1960); Note,

1961 Duke L.J. 133, 134-35. The Singer Case would seem to imply a cohesive and interrelated "right" to a pre-characterized trial by jury subsists in Art. III, Section 2 and the Sixth Amendment venue provisions.

2. Double Jeopardy.

The problems in Illinois began with an older opinion, People v. Hairston, 46 Ill. 2d 348, 263 N.E. 2d 840, in which the Illinois Court chose to deal with the prohibition against double jeopardy in situations of multiple crimes arising from a single transaction by vacating the verdict in one such offense, and thereby escaping the concept of double punishment to the accused. This has been an unsatisfactory device, except it provides the prosecution with a shotgun approach to prosecution of the criminally accused, and in the view of defense counsel, a fundamental and significant denial of fundamental fairness involved in due process guarantees. It has an especially raw application in crimes which approach punishment for status or association rather than for an overt act which can be used to predicate a finding of criminality on the part of the accused. See I Working Papers of the National Commission on Reform of Federal Criminal Laws, Comment on Basis of Criminal Liability; Culpability; Causation: Chapter 3; Section 610, at 105; Hall, Principles of Criminal Law 19, 59 (1947).

The complication of double jeopardy and collateral estoppel and their differing historical antecedents in Roman and Germanic law has left the United States Supreme Court statements with some ambivalence as to the scope of the protection against former adjudication and freedom from harassment, expense and emotional trauma of a trial as embodied in the Fifth Amendment. The cloak of immunity to impeach jury verdicts confuses the problem in the generality of the criminal verdict and the absence and adequacy of criminal pleadings to frame an issue. See

Sealfon v. United States, 332 U.S. 575, 578, 68 S.Ct. 237, 92 L. Ed. 180 (1948). The rationale which accords a substantive right in the prosecution by the election to charge an accused by two counts of a single indictment rather than two individual indictments and hence to avoid the res judicata holding of the Sealfon Case need hardly be accentuated as fundamentally unfair and a specious device of a prosecution oriented judicial interpretation.

3. Presumption of Innocence & Burden of Proof.

However inartfully defense counsel may have phrased his objection to the trial of defendant on the two counts, one of burglary and the other conspiracy to commit burglary, the proof of one being a lesser included offense, not by any positive legalism, but the possibility which develops from the proof at trial and the lack of adequate pleadings in all criminal trials, the presumptions which beset a criminal trial are unique to and a part of the system of criminal justice. These arise, not by a label, but from the operational and totally pragmatic nature of criminal trials, in which the issue formulation is left to jury instructions. This means that a defendant is or should be entitled to a full and adequate guarantee of the right to trial by jury, which cannot by its very nature, change without being a basic change from any fixed, historical definition derived from a study of early cases and constitutional provisions.

Defense counsel made his presentation of these issues to the trial court and to both the intermediate and appellate and supreme court of the State of Illinois. In affirming the trial court judgment of conviction, the appellate courts have had to construe the validity of state constitutional and statutory provisions as against a claimed federal right, which upheld the validity of the state laws by their application to the facts, and so held the application not to be a denial of a federally guaranteed right under the Fourteenth

Amendment. A close re-examination of Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L. Ed. 2d 491 (1968), and Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L. Ed2d 776 (1968), renders this a case properly within the rulings and characterization formulated in Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921), whether we discuss the denial of such rights under a broad guarantee such as the right to trial by jury, or seek to invoke the nominate, single issues of such traditional guarantees. In either case, the trial court and Illinois Appellate Courts were specifically asked to rule on the claimed validity of state statutes alleged to infringe upon the federal rights of Appellant, and in so doing, the federal question was both directly and by implication a part of their findings, and Title 28, Section 1257 (2) affords the right of appeal to these state court decisions.

Respectfully submitted,

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H.
APPENDIX

ILLINOIS CONSTITUTION OF 1970

Article 1, Section 2

Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

Article 1, Section 10

Self-Incrimination and Double Jeopardy

No person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense.

Article 1, Section 13

Trial by Jury

The right of trial by jury as heretofore enjoyed shall remain inviolate.

ILLINOIS REVISED STATUTES

Chapter 38, Section 8-2 Conspiracy

(a) Elements of the offense.

A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

(b) Co-conspirators.

It shall not be a defense to conspiracy that the person or persons with whom the accused is alleged to have conspired:

(1) Has not been prosecuted or convicted, or

(2) Has been convicted of a different offense, or

(3) Is not amenable to justice, or

(4) Has been acquitted, or

(5) Lacked the capacity to commit an offense.

(c) Sentence

A person convicted of conspiracy may be fined or imprisoned or both not to exceed the maximum provided for the offense which is the object of the conspiracy, except that if the object is an offense prohibited by Sections 11-15, 11-16, 11-17, 11-19, 24-1(a)(1), 24-1(a)(7), 28-1, 28-3 and 28-4 of the "Criminal Code of 1961," approved July 28, 1961, as amended or prohibited by Sections 401, 402, 403, 404, 406(b) or 407 of the "Illinois Controlled Substances Act,'" enacted by the 77th General Assembly, or an inchoate offense related to any of the aforesaid principal offenses the person convicted may be sentenced for a Class 3 felony however, conspiracy to commit treason, murder, or aggravated kidnaping shall not be sentenced in excess of a Class 2 felony, and conspiracy to commit any offense other than those specified in this subsection shall not be sentenced in excess of a Class 4 felony. Amended by P.A. 77-2638, Section 1, eff. January 1, 1973; P.A. 78-255, Section 61, eff. October 1, 1973.

Chapter 38, Section 19-1 Burglary

(a) A person commits burglary when without authority he knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle as defined in the Illinois Vehicle Code, railroad car, or any part thereof, with intent to commit therein a felony or theft.

This offense shall not include the offenses set out in Section 4-102 of the Illinois Vehicle Code.

(b) Sentence

Burglary is a Class 2 felony.

Amended by P.A. 77-906, Section 1, eff. Aug. 17, 1971; P.A. 77-2638, Section 1, eff. Jan. 1, 1973, P.A. 78-255, Section 61, eff. Oct. 1, 1973.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

General No. 12562 Agenda No. 75-86

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee
v.
PAUL LEEMON, SR.,
Defendant-Appellant

Appeal from Circuit Court Mason County No. 73-CF-31

Mr. JUSTICE GREEN delivered the opinion of the court:

Defendant Paul Leemon, Sr. was charged in the Circuit Court of Mason County in a 2 count indictment with the offenses of conspiracy to commit the burglary of, and the burglary of, the Mabel Kramer residence in that county on July 1, 1973. After a trial by jury he was found guilty of the conspiracy charge and not guilty as to the burglary charge and sentenced to 3-10 years imprisonment. He appeals.

Defendant's nephews Donald McCloud and Richard McCloud were apprehended in a field near the Kramer house on July 1, 1973, and have each pleaded guilty to the burglary. At the time of the trial, Richard had received a 3-5 year sentence, and Donald was awaiting sentencing. Defendant does not contest the sufficiency of the evidence to prove that the burglary was committed but maintains that the evidence was insufficient to prove beyond a reasonable doubt that he was guilty of a conspiracy to commit the burglary.

Donald McCloud was the principal witness for the People. He testified that he, his brother Richard, and the defendant met at the latter's house in Peoria a few days prior to the burglary, that they discussed information which they had concerning the presence of money in the Kramer residence, and that they decided to commit the burglary. He stated that early in the morning of July 1, 1973, he met his brother and the defendant at the Deluxe Cafe in Peoria and that they rode from there to Mason County with the defendant driving. This car belonged to Donald's employer and Donald had permission to use it. He further stated that upon arrival at the Kramer residence defendant got out of the car and knocked on the door. Since there was no one home, he and his brother Richard entered the house, but the defendant left with the understanding that the defendant would pick them up in fifteen minutes two blocks away. Donald's testimony was somewhat corroborated by his wife who testified, without objection, that at about 6 p.m. on the date in question defendant's son brought Donald's car back to her, handed her the keys, and stated that defendant had told him to return the car.

Richard McCloud also testified for the state. His testimony was that the car in question was a demonstrator borrowed from the place where his brother worked, that he, Donald, and a third person drove down to Mason County from Peoria, but that he could not remember who the other person was. On cross-examination he stated that he had never seen the third person before and that the third person could not have been the defendant because "I've never stole with him." None of the other evidence presented in the People's case in chief bore upon the involvement of the defendant.

Defendant testified that on the morning in question he took Richard to meet Donald at the Deluxe Cafe and had

coffee with them but returned home. He then woke his son, Paul, Jr. and asked him to help complete some carpentry work at the residence of some people named Nolanburg. Defendant said that he left before his son arose. He said that while at Nolanburg's he had a conversation with Harriet Renigar and that he saw a Mr. Schaffer at his home near the Nolanburg residence. He also said that while he was in a phone booth near the Nolanburg residence, he waved to Charles Waller who was driving by. Defendant testified that he had had arguments with Donald McCloud about money owed to defendant's wife. Donald had denied that such arguments occurred. Defendant admitted that he had been convicted of burglary in Tazewell County in 1966.

Defendant's wife testified that defendant left home about 8 a.m. on July 1, 1973, and returned home at approximately one o'clock for lunch. She further stated that he called her twice during the period to awaken Paul, Jr. and that Paul, Jr. finally left at about 11:00. Paul, Jr. testified that on the morning in question he got up at 10:30 and went to help his father at the Nolanburg residence. He stated that after completing the job the two returned home at approximately 1:30 in the afternoon. He stated that he picked up Donald McCloud's car at 6:00 after receiving an anonymous call and drove it to the McCloud residence.

Charles Waller testified that about 10:30 in the morning of that day he saw defendant at a phone booth in Peoria and honked at him. On cross-examination Waller admitted that shortly before the trial he talked with the defendant, that he had first recalled the time this occurred in a conversation he had with the defendant shortly before the trial, but that he remembered the day because he was going to his mother's house to discuss plans for the 4th of July. Helen Renigar was not called as a witness, and George

Schaffer testified that he was not at home on the day in question.

The Criminal Code of 1961 provides in part:

> "Elements of the offense. A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator." (Ill. Rev. Stat. 1973, ch. 38, par. 8-2(a)).

The only substantive evidence that defendant agreed to the commission of the burglary is the testimony of Donald McCloud, an accomplice. The uncorroborated testimony of such a witness is received with caution but, if strong enough, is sufficient to sustain a conviction (*People v. Mentola,* 47 Ill. 2d 579, 268 N.E. 2d 8; *People v. Burnett,* 13 Ill. App. 3d 931, 301 N.E. 2d 600). This is true even though his testimony is colored by either expectations of leniency (*People v. Nettles,* 107 Ill. App. 2d 143, 246 N.E. 2d 29) or malice towards the accused (*People v. Wollenberg,* 37 Ill. 2d 480, 229 N.E. 2d 490).

Here, most evidence contrary to the testimony of the accomplice is subject to infirmity. The defendant's testimony was contradicted by George Schaffer and weakened by Charles Waller's admission that he first had reason to remember the day of the occurrence only shortly before the trial. Richard McCloud's testimony was rendered uncertain by his inability to remember who the third person was and by his failure to state when he and Donald left the company of defendant who admitted he was with them at the Deluxe Cafe in Peoria on the morning of the burglary. The evidence was, therefore, sufficient for the jury to have believed beyond a reasonable doubt that the defendant was guilty.

Defendant next contends that the court should have granted his pre-trial motions to dismiss the conspiracy count. These motions were made on the theory that the inchoate offense of conspiracy to commit burglary would merge into the burglary if that offense was actually committed. There is no merit to this argument. Ill. Rev. Stat. 1973, ch. 38, par. 8-5 provides that:

> "No person shall be convicted of both the inchoate and the principal offense."

The committee comments to that section state:

> ". . . . By virtue of the definition of 'conviction,' *this means that prosecution may be had for both offenses in the same trial (by separate counts)* or separately. But after proceeding finally to verdict of guilty on one or both, the judgment of conviction and sentence shall be entered on only one offense" (emphasis added).

This rule has been followed in *People v. Brouilette,* 92 Ill. App. 2d 168, 236 N.E. 2d 12 and *People v. DeStefano,* 85 Ill. App. 2d 274, 229 N.E. 2d 325. This was also the rule prior to the Criminal Code of 1961 (*People v. Robertson,* 284 Ill. 620, 120 N.E. 539).

In the case under consideration the court did not give the jury any opportunity to find defendant guilty of both the burglary and the conspiracy. Without objection by defendant or his tender of any forms of verdict, the court submitted forms of verdicts to the jury that would allow them to find defendant either not guilty of all charges, guilty of burglary but not guilty of conspiracy, or guilty of conspiracy but not guilty of burglary. Defendant contends, nevertheless, that the conviction should be reversed because verdicts finding him guilty of conspiracy but not guilty of burglary were inconsistent. Defendant has waived this issue, however, because of his failure to object to the forms

of verdict, *People v. Jones,* — Ill. 2d —, — N.E. 2d — (Nos. 45631, 45633; filed March 24, 1975). Furthermore, since the charge of conspiracy involved elements different from those of burglary, the verdicts, although logically inconsistent under the proof, were not inconsistent at law and would not give rise to reversal (*People v. Hairston,* 46 Ill. 2d 348, 263 N.E. 2d 840).

Defendant also complains of two alleged improprieties which he raised for the first time in the post-trial motion. These charges are not supported by affidavit. One is that a juror was allowed to leave the courthouse during a recess. The record does not indicate that the jury had been sequestered at that time. The other charge is that during a recess, the state's attorney had a conversation with a defense witness. Defense counsel admitted that he had no evidence to support his allegation. Clearly no error was committed with regard to these two allegations.

The judgment is affirmed.

AFFIRMED.

TRAPP, P. J., and CRAVEN, J., concur.

I.

No application for rehearing was made in either appellate court in Illinois, and the time for such has now expired.

J.

SHORT RECORD APPENDED
FROM ILLINOIS SUPREME COURT

APPEAL FROM THE
SUPREME COURT OF ILLINOIS

No. 47719

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent v. PAUL LEEMON, SR., Petitioner	Petition for Leave to Appeal from Appellate Court Fourth District 12562 73-CF-31

INDEX OF DOCUMENTS TRANSMITTED TO THE
SUPREME COURT OF THE UNITED STATES

1. Notice, affidavit, motion by petitioner and order of Chief Justice Robert C. Underwood filed July 22, 1975, extending the time for filing petition for leave to appeal to and including July 23, 1975.

2. Petition for leave to appeal filed July 22, 1975.

3. Mandate of the Supreme Court of the State of Illinois denying petition for leave to appeal September 25, 1975.

4. Notice, motion by petitioner and order of Chief Justice Robert C. Underwood filed October 16, 1975, staying the mandate of this Court pending disposition of petitioner's appeal to the Supreme Court of the United States.

5. Notice of Appeal to the Supreme Court of the United States, together with proof of service, filed January 13, 1976.

6. Notice, affidavit and motion by petitioner filed January 13, 1976, for an extension of time to and including March 14, 1976, for docketing this cause in the United States Supreme Court.

7. Order entered January 16, 1976, denying the motion by petitioner for an extension of time to and including March 14, 1976, for docketing this cause in the United States Supreme Court, without prejudice to the right of petitioner to apply to that Court for an extension of time and without prejudice to the order previously entered by this Court staying the mandate.

8. Certification.

No. 47719

IN THE SUPREME COURT

STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. PAUL LEEMON, SR., Defendant-Appellant	Petition for leave to appeal from Illinois Appellate Court, Fourth District No. 12562

ORDER

Now on this 16th day of July, 1975, Michael W. Hogan, attorney for defendant-appellant, presents his motion, affidavit and proof of service for an extension of time in which to file the Petition for Leave to File Appeal in said cause, and the Court being fully advised in the premises, and otherwise satisfied that adequate grounds exist for the allowance of said extension of time,

IT IS HEREBY ORDERED that the time for defendant-appellant, Paul Leemon, Sr., to file Petition for Leave to Appeal, is hereby extended to and including the 23rd day of July, 1975.

/s/ Robert C. Underwood
Justice, Illinois Supreme Court

Filed July 22, 1975, Clell L. Woods, Clerk

No. 47719

IN THE SUPREME COURT

STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. PAUL LEEMON, SR., Defendant-Appellant	Petition for leave to appeal from Illinois Appellate Court, Fourth District No. 12562

MOTION

Now comes defendant-appellant herein, by Pree & Pree, attorneys, and moves that the time for filing appellant's petition in the above-entitled cause may be extended to the 23rd day of July, 1975, and in support of this motion,

appellant files herewith an affidavit by Attorney Michael W. Hogan.

PAUL LEEMON, SR.,
Defendant-Appellant

BY: PREE & PREE
Attorneys for Defendant-Appellant
/s/ BY: Michael W. Hogan

PREE & PREE
Attorneys for Defendant-Appellant
904-5 Myers Building
Springfield, Illinois 62701
Telephones: 523-8913 & 544-9414

Filed July 22, 1975, Clell L. Woods, Clerk

No. 47719

STATE OF ILLINOIS } SS
COUNTY OF SANGAMON }

AFFIDAVIT

Michael W. Hogan, being first duly sworn, upon oath deposes and says as follows: that he is associated with the law firm of Pree & Pree with offices in the Myers Building, Springfield, Illinois; that he is in charge of the preparation of appellant's brief herein; that because of court commitments and trials, as well as other appeals to this Honorable Court, and a heavy workload during the months of June and July, 1975, he has been unable to complete the preparation of appellant's brief by July 17th, the due date; that it will be necessary in order to prepare appellant's brief and have the same printed, that the time be extended; that the brief is now with the printer and your affiant has been duly informed that they cannot print the brief and have it ready for filing before the 23rd day of July, 1975; that affiant expects to be able to complete the preparation

of said brief and printing by July 23, 1975; that this motion for extension of time is not made for the purpose of delay.

Further affiant sayeth not.

/s/ Michael W. Hogan

Subscribed and sworn to before me, a Notary Public, this 16th day of July, A.D. 1975.

/s/ Mary R. Martin
Notary Public

Filed July 22, 1975, Clell L. Woods, Clerk

No. 47719

CERTIFICATE OF SERVICE

Michael W. Hogan, one of the attorneys for the defendant-appellant, does hereby certify that on the 16th day of July, 1975, he caused to be deposited in the United States Mail, at Springfield, Illinois, in a sealed envelope, with sufficient postage prepaid, a copy of the foregoing Motion and Affidavit, addressed to William H. Knuppel, 124 West Market, Havana, Illinois 62644, and G. Michael Prall, 334 Unity Building, Bloomington, Illinois 61701, Attorneys for Plaintiff-Appellee.

/s/ Michael W. Hogan

Filed July 22, 1975, Clell L. Woods, Clerk

UNITED STATES OF AMERICA

STATE OF ILLINOIS } SS.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

Present: Robert C. Underwood, Chief Justice, Justice

Walter V. Schaefer, Justice Daniel P. Ward, Justice Joseph H. Goldenhersh, Justice Thomas E. Kluczynski, Justice Charles H. Davis, Justice Howard C. Ryan, William J. Scott, Attorney General, William G. Lyons, Marshal. Attest: Clell L. Woods, Clerk.

Be it remembered, that, to-wit: on the 25th day of September 1975, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 47719

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent v. PAUL LEEMON, SR., Petitioner	Petition for Leave to Appeal from Appellate Court Fourth District 12562 73-CF-31

And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this day of , 19

Clerk, Supreme Court of the State of Illinois.

No. 47719

IN THE SUPREME COURT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

PAUL LEEMON, SR.,
Defendant-Appellant

ORDER

The motion of defendant that the mandate of this Court be stayed pending disposition of defendant's appeal to the Supreme Court of the United States coming on to be heard upon proof of notice and without objection,

IT IS ORDERED that said motion is allowed and the mandate of this Court stayed pending disposition of defendant's appeal to the Supreme Court of the United States.

DATED: October 15, 1975.

Robert C. Underwood
Chief Justice,
Supreme Court of Illinois

Filed Oct. 16, 1975, Clell L. Woods, Clerk

STATE OF ILLINOIS
IN THE SUPREME COURT
SPRINGFIELD, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

PAUL LEEMON, SR.,
Defendant-Appellant

CASE NO.
47719

MOTION FOR
STAY OF MANDATE PENDING APPEAL
(Supreme Court Rule 368(c))

Paul Leemon, Sr., through his attorneys, Michael W. Hogan and Edward G. Pree, will file Notice of Appeal to the Supreme Court of the United States appealing the final judgment and decree of his cause entered on September 25, 1975. No Petition For Rehearing pursuant to Ch. 110A, Section 367, Illinois Revised Statutes is to be filed.

Therefore, the appellant moves that execution of said mandate be stayed in all respects pending final disposition of the appeal and that an order be made with respect to a continuation of the bond for said stay of execution, pursuant to Ch. 110A, Section 368(c), Illinois Revised Statutes.

Dated this 10th day of October, 1975.

Respectfully Submitted,

Michael W. Hogan and
Edward G. Pree,
Attorneys For Appellant

/s/ By Michael W. Hogan
904-5 Myers Building
Springfield, Illinois 62701

Filed Oct. 16, 1975, Clell L. Woods, Clerk

STATE OF ILLINOIS
IN THE SUPREME COURT
SPRINGFIELD, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. PAUL LEEMON, SR., Defendant-Appellant	CASE NO. 47719

NOTICE OF FILING MOTION

TO: William H. Knuppel, State's Attorney, Mason County,
124 West Market Street, Havana, Illinois 62644

G. Michael Prall, Principal Attorney,
Illinois State's Attorneys Assoc.
Statewide Appellate Assistance Serv.
334 Unity Building, Bloomington, Illinois 61701

PLEASE TAKE NOTICE, that I, Michael W. Hogan, one of the attorneys for the Defendant, Paul Leemon, Sr., did cause to have filed a Motion For Stay of Mandate Pending Appeal, Order Staying Issuance of Mandate, and this Notice of Filing Motion For Stay of Mandate, with the Clerk of the Illinois Supreme Court, and I did, on the same date mail a copy of said Motion, Order, and Notice of Filing Motion to the above named persons, at the addresses listed beneath their names, addressed to their last known address, with sufficient postage for the same to go First Class Mail, and did deposit them in the United States Mail, at Springfield, Illinois 62701, this 10th day of October, 1975.

/s/ Michael W. Hogan
Attorney For Defendant

Subscribed and sworn to before me, Mary R. Martin, a

Notary Public within and for the County of Sangamon, State of Illinois, this 10th day of October, 1975.

Mary R. Martin, Notary Public

Filed Oct. 16, 1975, Clell L. Woods, Clerk

No. 47719
IN THE SUPREME COURT
STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee v. PAUL LEEMON, SR., Defendant-Appellant

NOTICE OF APPEAL

Now comes Defendant-Appellant, Paul Leemon, Sr., by his undersigned counsel, Michael W. Hogan, and files his Notice of Appeal from the Order of the Illinois Supreme Court dated September 25, 1975, denying the Defendant's petition for leave to appeal in Cause No. 47719, entitled People of the State of Illinois, Respondent vs. Paul Leemon, Sr., Petitioner, being by its nature affirmance of the findings and opinion of the Illinois Court of Appeals, 4th District, dated May 22, 1975, and

Said appeal is taken pursuant to Title 28, U.S.C. Section 1257(2).

/s/ Michael W. Hogan

Filed Jan. 13, 1976, Clell L. Woods, Clerk

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing

instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois, on the 13 day of January, 1976.

/s/ Michael W. Hogan

No. 47719

IN THE SUPREME COURT

STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

PAUL LEEMON, SR.,
Defendant-Appellant

MOTION OF DEFENDANT FOR ENLARGEMENT OF TIME FOR NOTICE OF APPEAL AND DOCKETING SAID CAUSE WITH CLERK OF UNITED STATES SUPREME COURT.

Now comes PAUL LEEMON, SR., Defendant-Appellant, by his attorneys, Pree & Pree and Michael W. Hogan and moves this Honorable Court, for enlargement of the time filing his notice of appeal and docketing said cause with the Clerk of the United States Supreme Court, pursuant to Rule 368(c) of the Illinois Supreme Court, for a period of sixty (60) days, on the grounds that counsel for Defendant-Appellant, PAUL LEEMON, SR., have not been able to research the law, write the jurisdictional statement and

secure the publication of the jurisdictional statement within the time allotted, and it will irreparably damage and prejudice the rights of the Defendant-Appellant if not allowed.

The original order staying the mandate of the Supreme Court was made and entered in this cause on October 15, 1975, a copy of which is appended hereto, and the additional extension of time is asked from and including the 13th day of January, 1976 to and including the 14th day of March, 1976.

PAUL LEEMON, SR., Defendant-Appellant

/s/ Michael W. Hogan

Pree & Pree & Michael W. Hogan
Attorneys for Defendant-Appellant
904-5 Myers Building, Springfield, Illinois 62701
Telephone: 523-8913 & 544-9414

No. 47719

IN THE SUPREME COURT

STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

PAUL LEEMON, SR.,
Defendant-Appellant

AFFIDAVIT

STATE OF ILLINOIS } SS
COUNTY OF SANGAMON }

Comes now MICHAEL W. HOGAN, one of the attorneys

for the Defendant-Appellant, PAUL LEEMON, SR., and being of lawful age and first duly sworn, state to the Court as follows:

1. That affiant is counsel for Defendant-Appellant, Paul Leemon, Sr., in the above-entitled cause.

2. That this Court entered on October 15, 1975, its Order Staying the Issuance of the Mandate of the Supreme Court of Illinois, which affirmed the conviction of Defendant-Appellant, for a period of 90 days which order expires on January 13, 1976.

3. That attorneys for Defendant-Appellant have not been able to properly research the law, prepare the jurisdictional statement required and have it printed in proper form within the time allotted, due to the press of other business, the holiday season, and the efforts of affiant to relocate his business and family in the Springfield community.

4. That to fail to enlarge the time for filing the notice of appeal and docketing the cause with the United States Supreme Court will terminate Defendant-Appellant's right to appeal, and irreparably prejudice and damage his right to review before said Court.

5. That said circumstances are elements which are beyond the control of counsel, and this further enlargement of time is not taken in bad faith, or in an effort to forestall consideration of Defendant's cause.

6. That these circumstances represent extraordinary grounds for granting said enlargement of time for filing the notice of appeal and docketing the cause in the United States Supreme Court.

/s/ Michael W. Hogan, Affiant

STATE OF ILLINOIS }
COUNTY OF SANGAMON } SS

Personally before me, a notary public within and for the County and State aforesaid, came and appeared MICHAEL W. HOGAN, known to me, being of lawful age and first duly sworn, and stated upon his oath that he is the person who executed the above and foregoing affidavit, that he read the same, and that it is true and correct in substance and fact.

Subscribed and sworn to before me, a notary public, within and for the County and State aforesaid, this 13th day of January, 1976.

/s/ Vickie L. Rapps, Notary Public

My Commission Expires: May 12, 1979

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois, on the 13 day of January, 1976.

/s/ Michael W. Hogan

No. 47719

IN THE SUPREME COURT
STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee

v.

PAUL LEEMON, SR.,
Defendant-Appellant

NOTICE OF MOTION FOR ENLARGEMENT OF TIME TO FILE NOTICE OF APPEAL

TO: Hon. William H. Knuppel, State's Attorney
Mason County Courthouse, Havana, Illinois
AND
Illinois State's Attorneys Assn.
909 Myers Building, Springfield, Illinois 62701

PLEASE TAKE NOTICE that Defendant-Appellant, PAUL LEEMON, SR., will appear before the Hon. Daniel Ward, Chief Justice of the Illinois Supreme Court and present his motion for enlargement of time to file his notice of appeal and docket said cause in the United States Supreme Court on January 13, 1976, at 2:00 p.m. in the Supreme Court Building, Springfield, Illinois, in Chambers, or such other room as shall be assigned for hearing said motion, and that you may appear at said hearing, if you so choose.

/s/ Michael W. Hogan
Attorney for Defendant-Appellant.

PREE & PREE & Michael W. Hogan
Attorneys for Defendant-Appellant
904-5 Myers Building, Springfield, Illinois 62701
Telephones: 523-8913 & 544-9414

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record of all parties to the above cause by enclosing the same in an envelope addressed to such attorneys at their business address as disclosed by the pleadings of record herein with postage fully prepaid, and by depositing said envelope in a U.S. Post Office Mail Box in Springfield, Illinois, on the 13th day of January, 1976.

/s/ Michael W. Hogan

UNITED STATES OF AMERICA

STATE OF ILLINOIS } SS.
SUPREME COURT }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of January in the year of our Lord, one thousand nine hundred and seventy-six, within and for the State of Illinois.

Present: Daniel P. Ward, Chief Justice, Justice Walter V. Schaefer, Justice Thomas E. Kluczynski, Justice Howard C. Ryan, Justice Robert C. Underwood, Justice Joseph H. Goldenhersh, Justice Caswell J. Crebs, William J. Scott, Attorney General. Attest: Clell L. Woods, Clerk.

BE IT REMEMBERED, that, to-wit: on the 16th day of January, A.D. 1976, the same being one of the days of

the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

No. 47719

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent v. PAUL LEEMON, SR., Petitioner	Petition for Leave to Appeal from Appellate Court Fourth District 12562 73-CF-31

And now, on this day, the Court having duly considered the motion by petitioner for an extension of time to and including March 14, 1976, for docketing this cause in the United States Supreme Court, and being fully advised of and concerning the premises;

IT IS HEREBY ORDERED that the motion by petitioner for an extension of time to and including March 14, 1976, for docketing this cause in the United States Supreme Court be, and the same is, denied without prejudice to the right of petitioner to apply to that Court for an extension of time and without prejudice to the order previously entered by this Court staying the mandate.

UNITED STATES OF AMERICA

STATE OF ILLINOIS } SS.
SUPREME COURT }

I, Clell L. Woods, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal

thereof, do hereby certify the foregoing to be a true copy of the record of this Court in a certain cause entitled:

No. 47719

THE PEOPLE OF THE STATE OF ILLINOIS, Respondent v. PAUL LEEMON, SR., Petitioner	Petition for Leave to Appeal from Appellate Court Fourth District 12562 73-CF-31

filed in this office on the 22nd day of July A.D. 1975.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 29th day of March 1976.

/s/ Clell L. Woods, Clerk,
Supreme Court of the State of Illinois

Supreme Court, U. S.
FILED
OCT 29 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1581

PAUL LEEMON, SR.,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

MOTION FOR REHEARING OF ORDER DENYING APPEAL AND IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

PREE & PREE, Attorneys
EDWARD G. PREE and
MICHAEL W. HOGAN
904-5 Myers Bldg.
Springfield, Illinois 62701
Attorneys For Appellant

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 75-1581

PAUL LEEMON, SR.,

Appellant,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Appellee.

MOTION FOR REHEARING OF ORDER DENYING APPEAL AND IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

Now comes the Appellant, Paul Leemon, Sr., by his undersigned attorneys, Pree & Pree, Attorneys, Edward G. Pree and Michael W. Hogan, and files his motion for rehearing and reconsideration of this Court's Order dated October 4, 1976, in the above entitled cause, which with caption omitted reads in words and figures as follows:

> "The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied."

and moves the court upon the following grounds:

1. The cause was properly filed, docketed and entered in the proceedings of the United States Supreme Court

and given case number 75-1581. No motion challenging the jurisdiction or other responsive pleadings were filed by the adverse party hereto. Counsel feels this Court has jurisdiction of this appeal under the principles discussed in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) and unresolved question of prosecution of multiple crimes arising from a single factual transaction set forth in *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948).

2. That said cause of action is properly grounded upon the same case law and arguments set forth in the cause of *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), and which case on the issue of merger of inchoate and substantive crimes, and which the opinion in said case does not determine but sustains the position of Appellant as his indictment for conspiracy and burglary DO NOT contemplate the activity of other persons to the substantive offense and no presumption of legislative intent can be drawn from the Illinois provision on conspiracy, as the historical notes to said Illinois Statute reveal that the criminal law committee neglected or refused to comment on said doctrine of merger or that said crimes were to be treated independently. Chapter 38, Section 8-2, Illinois Revised Statutes.

3. That the opinion in *Iannelli v. United States,* 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975), discusses the "Wharton Rule" and attempts to define this objection to inconsistent verdicts as a judicial presumption, discretionary in nature, but said rule also arises from the absence of adequate pleadings in criminal causes; the paucity of issue formulation and the prejudicial evidentiary admissions which are indulged under a conspiracy charge; the elimination of differentiation of criminal responsibility of parties

to a crime; admissions for acts of others without specific intent as to the acts or omissions of other parties; evidence relating to the substantive offenses without proper proof of the conspiracy agreement under the doctrine of complicity, and the denial to defendant to argue punishment or submit an instruction that the jury might consider the punishment to be imposed in rendition of its verdict, all of which renders "Wharton's Rule" a recognition of the fundamental right to a logically and legally consistent verdict as part of the Sixth Amendment right to trial by jury. *Iannelli v. United States,* 420 U.S. 616, 791 (opinion seems limited in direct application to Title 18 USC Section 1955).

4. The uniformity principles set forth in *Duncan v. Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968) and *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 7071 (1969) regarding trial by jury, should insure to Defendant that inchoate offenses which are premised upon certain elements one of which is the commission of an overt act by Defendant and/or his co-conspirators, and a jury verdict which finds directly by joint conviction, or impliedly, by acquittal of one offense and conviction of the other in such a joint indictment, the overt act necessary to give the conspiracy sufficient evidentiary support of intention, produce a verdict which can be logically and legally consistent with guilt on both offenses. In the case of Defendant, Paul Leemon, Sr., the overt act of driving to the place of the burglary was the common element of both offenses, the "Overt Act" which constituted a part of both charges, and the jury made a finding of guilt on the conspiracy and non-guilt on the burglary. See Jurisdictional Statement pp. 4-10 inclusive.

Under the above cases with reference to a right to trial by jury, the same standard and application of Wharton's

Rule should be required in state courts as in federal courts under the absorption doctrine announced in *Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653, or Defendant Leemon will be seriously prejudiced in the application of his right to trial by jury and its enforcement under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

5. One of the most telling problems in the confusion of handling the octopus or shotgun approach of the prosecutorial zealot, lies in the ignorance of the jury and the indifference of the judiciary to maintenance of the basic principles announced in Wharton's Rule and the *Iannelli* opinion. The Appellate Courts in Illinois have used the device of setting aside the dual conviction as a means for circumventing the double jeopardy challenge to the multiple count indictment, and the concept of double jeopardy, although ruled upon in *Iannelli,* seems to be worthy of reconsideration in light of the Court's divided opinion in *Iannelli v. United States,* and *In re Jones,* that double jeopardy relates to the exposure to and the hardship of trial, and not simply to the threat or actuality of double punishment. Art. III, Section 2, United States Constitution; Sixth Amendment to United States Constitution; *Dunn v. United States,* 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Sealfon v. United States,* 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1945); *George v. Illinois,* 167 Ill. 447, 47 N.E. 741 (1897).

The Illinois Court seems to explain the independent motivation test to sustain conviction for multiple crimes arising from the same circumstantial transaction, apparently on the grounds that intent or motivation is a separable element in multiple crimes and no reversal of multiple verdicts and sentences is necessary. See *People v. Morgan,* — Ill.App.3d —, 350 N.E.2d 27, 35-36 (1976).

This concept of remedial election by the appellate court after trial and conviction and sentencing hardly seems justified if double jeopardy is going to be something more than a meaningless ritual to clear up the prosecution's inability to prove its case without the license to charge an accused with multiple offenses regardless of the prejudicial effect of forced joinder and trial.

The "intent" situation when it amounts to the same intent for multiple crimes arising from the same factual transaction is discussed in *People v. Roop,* — Ill.App.3d —, 350 N.E.2d 236, 239, and Defendant Leemon should be discharged on the basis of the "most serious crime" rule by virtue of his acquittal on the burglary charge.

The analogous inconsistency of a single intent found in one crime but not found in another, when both offenses are part of the same transaction is discussed in *People v. Viser,* — Ill.App.3d —, 343 N.E.2d 903, 911 (1976).

The final difficulty in fundamental fairness and substantial justice lies in the language which allows the court to find legally and logically inconsistent verdicts within the province of jury deliberations as to lenity, and which prohibits the Defendant from arguing punishment or submitting an instruction as to such a finding of lenity to the jury. If lenity is a proper issue for jury consideration, then Defendant should be entitled to an instruction in the absence of issue formulation at some stage prior to trial. The Illinois Supreme Court appoints the committee to draft the approved instructions, and then penalizes the accused by failure of his counsel to ask for the proper instructions of the trial court, and fails to require the court to give the proper instructions to protect the defendant from prejudice. Defense can hardly overcome such a loaded deck consideration. See *People v. De Boise,* — Ill.App.3d —, 341 N.E.2d 483, 487.

WHEREFORE, the Defendant, Paul Leemon, Sr., prays this Court for reconsideration and rehearing of the Order dated October 4th, 1976, denying said appeal and in the alternative, denying certiorari, and moves the Court to reinstate said cause for determination on the merits, and for a stay of the Court's mandate in said cause until said rehearing can be held, and for such other and further relief in the premises as to the Court shall seem just and proper.

Respectfully submitted,

PREE & PREE, Attorneys
EDWARD G. PREE and
MICHAEL W. HOGAN

by _____
Attorneys For Appellant

IN THE SUPREME COURT
OF THE UNITED STATES

PAUL LEEMON, SR.
Appellant

vs.

PEOPLE OF THE STATE OF ILLINOIS
Appellee

NO. 75-1581

STATE OF ILLINOIS }
COUNTY OF SANGAMON }

AFFIDAVIT OF COUNSEL

Now on this 25th day of October, 1976, comes MICHAEL W. HOGAN, one of the attorneys for the Defendant, PAUL LEEMON, SR., and being of lawful age and first duly sworn states upon his oath that said Motion for Rehearing is not made for the purposes of delay, but upon a good faith, earnest and sincere belief that said cause should be reevaluated in the light of the Wharton Rule as announced in the case of Iannelli vs. United States, 420 U.S. 770, 43 L.Ed. 2d 616, 95 S.Ct. 1284 (1975), and the other grounds advanced by counsel, and finally by reason of the divided opinions in the Iannelli opinion and the charge in judicial personnel which time has occasioned even since the rendition of that opinion.

/s/ Michael W. Hogan

Subscribed and sworn to before me, a Notary Public, within and for the County and State aforesaid, this 25th day of October, 1976.

/s/ Vickie L. Stamper
Notary Public

My commission expires:
June 18, 1980